WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

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HONOR ROLL

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) IMPOUND ORDINANCES OR WAC RULES ADOPTED UNDER AUTHORITY OF RCW 46.55.113 PROVISIONS RELATING TO VEHICLES DRIVEN BY SUSPENDED, REVOKED DRIVERS MUST ALLOW OFFICERS TO CONSIDER REASONABLE ALTERNATIVES TO IMPOUNDMENT – In All Around Underground, Inc. v. WSP, __ Wn.2d __, __ P.3d __ (2002) (2002 WL 31770464), the Washington Supreme Court votes 5-4 to invalidate the Washington State Patrol (WSP), administrative rule WAC 204-96-010, which, based on RCW 46.55.113, mandates impoundment of vehicles driven by suspended or revoked drivers, is not valid. The Court rules that RCW 46.55.113 requires that WAC rules or local ordinances adopted under the statute cannot make impoundment mandatory, and that such ordinances and WAC rules instead must give officers discretion to consider reasonable alternatives in making impoundment decisions.

In 1998, the Washington Legislature amended RCW 46.55.113 to authorize local jurisdictions to adopt ordinances, and to authorize state agencies to adopt administrative rules, allowing, among other things, for the impounding of motor vehicles driven by drivers with suspended or revoked licenses. In response, WSP adopted a WAC rule that mandated impoundment of vehicles driven by suspended or revoked drivers. Each of the two cases that came to the Washington Supreme Court in the All Around case began with a WSP trooper impounding a commercial vehicle that was being driven by a suspended driver. There was no question in either case that the WSP trooper correctly interpreted the WSP WAC rule in impounding the vehicle. Judicial impoundment hearings followed in each case, and the cases were eventually appealed to the Washington Supreme Court, where they were consolidated for review.

The Supreme Court majority opinion expressly sidesteps the constitutional issue raised in the case. Thus, the majority opinion does not expressly declare whether RCW 46.55.113 would be constitutional if the statute did in fact authorize mandatory impound ordinances or rules that did not allow officers to determine whether there were reasonable alternatives to impoundment. However, language in the majority opinion by Justice Sanders (joined by Justices Alexander, Chambers, Owens and the since-retired Justice Smith) and a concurring opinion by Justice Chambers suggest that those five justices would rule, if the issue were squarely presented, consistent with prior Court of Appeals decisions in such cases as State v. Coss, 87 Wn. App. 891 (Div. III, 1997) Feb 98 LED:17 and State v. Reynoso, 41 Wn. App. 113 (Div. III, 1985). In those cases, the Court of Appeals indicated that article 1, section 7 of the Washington Constitution requires consideration of reasonable alternatives to impoundment in every case where impoundment is being considered in relation to a vehicle operated by a suspended or revoked driver.

Justice Johnson writes a dissenting opinion in the All Around case. He is joined by Justices Ireland, Madsen and Bridge. The dissenting opinion argues that the Court should have construed RCW 46.55.113 as authorizing a mandatory impound rule or ordinance. Strangely, however, the dissent does not mention the constitutional issue in the case. As the majority opinion points out, while, in light of the majority's resolution of the case based on statutory interpretation, it makes sense for the majority to avoid the constitutional issue, it does not make logical sense for the dissent to disagree with the result of the majority opinion without addressing the constitutional issue of whether reasonable alternatives to impoundment must always be considered before impounding a vehicle based on the suspended or revoked status of the license of the driver.

Result in the two consolidated cases: All Around Underground, Inc., is held entitled to impound and storage fees and court filing fee; the case is remanded to the King County District Court for entry of judgment. American L.S. Maintenance, Inc., is held entitled to impound, towing and storage fees and court filing fee previously awarded; the company is also held entitled to compensation for loss of use of its impounded dump truck; the case is remanded to the Cowlitz County District Court for determination of the company's damages for loss of use of the truck, and for entry of a judgment including that amount.

(2) ACTUAL TEMPERATURE OF SIMULATOR SOLUTION NEED NOT BE PROVEN IN ORDER TO MEET WAC RULE'S FOUNDATIONAL REQUIREMENT FOR ADMISSION OF BREATH TEST RESULTS INTO EVIDENCE – In City of Seattle v. Allison, __ Wn.2d __, 55 P.3d 85 (2002), the Washington Supreme Court holds in a 6-3 decision that, in order to meet the foundational requirements for admissibility of breath test results, the prosecution is not required to prove the actual temperature of the simulator solution in DataMaster breath testing machines.

To establish compliance with former WAC 448-13-040 and the foundation for admissibility of the breath test document, the prosecution need only present a breath test document that shows that the solution was within the specified range, the majority opinion holds. In that circumstance, the document itself is prima facie evidence that the prosecution complied with former WAC 448-13-040, and submission of the document as evidence in a DUI prosecution therefore satisfies the foundational requirements for admissibility of the document.

Justice Sanders writes a dissenting opinion arguing for categorical suppression; he is joined by Justices Johnson and Chambers; Justice Chambers also writes a separate opinion concurring in Justice Sanders' dissent.

Result: Reversal of BAC-test suppression rulings of Seattle Municipal Court in separate DUI prosecutions against Fawn Allison and two other defendants; cases remanded for trial.

(3) SUPREME COURT VALIDATES ITS OWN RULES THAT REQUIRE WARNING OF RIGHT TO COUNSEL IMMEDIATELY FOLLOWING CUSTODIAL ARREST, REGARDLESS OF MIRANDA APPLICABILITY; BUT VIOLATION OF RULE THROUGH IMPROPERLY WORDED WARNING IS HELD HARMLESS UNDER FACTS OF CASES AT ISSUE BECAUSE NOT PREJUDICIAL – In State v. Templeton, __ Wn.2d __, 59 P.3d 632 (2002), the Washington Supreme Court unanimously rejects the State's challenge to the Court's authority to adopt rules requiring counsel-right warnings immediately following arrest (see CrR 3.1 and CrRLJ 3.1). The Court is also unanimous in rejecting the prosecutor's argument that the wording of the warnings in the consolidated cases before it was not defective under the Court Rules. But a 5-4 majority of the Court rules that violation of the Court Rules through improper wording of the warnings under forms then being used by the Washington State Patrol (since revised) was "harmless error" or not prejudicial under the facts of the consolidated cases before the Court.

Background information regarding interplay of the Court Rules and Miranda

Washington Court Rules for Superior Court and for courts of limited jurisdiction -- CrR 3.1 and CrRLJ 3.1 -- require that, immediately following a custodial arrest, officers advise the arrestee of his or her right to counsel (for the text of the rules, go to the Internet site for the Washington courts at [http://www.courts.wa.gov/], click on "court rules," and click on the appropriate rule). The rules, as identically interpreted by Washington appellate courts, require that, immediately following custodial arrest, an arrestee be advised that he or she has a right at that time to a lawyer, and that, if he or she cannot afford an attorney, one will be provided without charge.

The warnings that are required under CrR 3.1 and CrRLJ 3.1 must be given to every person subjected to custodial arrest. It does not matter that the officer does not intend to interrogate the arrestee. In contrast, under the Fifth Amendment and Miranda, unless there is both custody and interrogation, there is no requirement for warnings. CrR 3.1 and CrRLJ 3.1 are thus more demanding than Fifth Amendment Miranda requirements in this respect, because the Court Rules require warnings to every custodial arrestee. In another respect, however, the Court Rules are less demanding than Fifth Amendment Miranda requirements, because the Court Rules do not require that the officer seek a waiver following the giving of the warnings.

Ruling on inadequacy of the former WSP warnings

The majority opinion in Templeton concludes that the warnings in the cases before it were inadequate, and the Court implicitly adopts the analysis of Divisions One and Two of the Court of Appeals in those Courts' earlier opinions in the consolidated cases in Templeton. In excerpt-form, the majority's explanation is as follows:

> We next consider whether the advisement on WSP DUI Arrest Report form satisfied CrRLJ 3.1(b)(1) which provides that "[t]he right to a lawyer shall accrue as soon as feasible [immediately] after the defendant has been arrested." The advisement form employed by [WSP] prior to the dates of arrest in these cases (previous form) stated that "[y]ou have the right at this time to an attorney of your own choosing and to have him or her present before or during questioning." The form further provided that "[i]f you cannot afford an attorney you are entitled to have one appointed for you by the court without cost to you and to have him or her present before or during questioning." On the dates of the arrests in these consolidated cases, a revision had been made to the form … deleting the words "at this time." The effect of this revision was to provide that the right to a lawyer accrues, not when a person is taken into custody, but rather at the time an arrestee is questioned or judicial proceedings instituted, whichever is earlier.
>
> As we have noted, the court rule, which we construe to provide a right to counsel immediately upon arrest, goes beyond the constitutional requirements of the Fifth and Sixth Amendments of the United States Constitution. As set forth in Miranda v. Arizona, under the Fifth Amendment the advisement of rights need be given only if a suspect is in custody and about to be interrogated. Further, absent the court rule, the right to counsel guaranteed by the Sixth Amendment attaches only if judicial proceedings have been initiated.
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> The State contends that the giving of Miranda rights satisfied CrRLJ 3.1, relying on [two prior Washington appellate court decisions]. In both those cases the court concluded the warnings read to defendants (except for [one of the defendants]) were sufficient to advise them of their right to counsel under [both] Miranda and under the Court Rule. The advisement read in those cases, however, adequately conveyed that the defendants had a right to assistance of counsel immediately after arrest and could exercise that right at any time.

> In Templeton [107 Wn. App. 144 (Div. I, 2001) **Sept. 01 LED:12**] the Court of Appeals, Division One, acknowledges that "[p]roperly worded Miranda warnings may be sufficient to advise a person of the rule-based right to counsel even if the warnings do not mirror the language of the rule. If the warnings given here had adequately conveyed to Respondents their right to consult counsel before the breath test, then the warnings would have satisfied the rule." Division One concluded, "Unfortunately, they did not."
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> In Dunn [108 Wn. App. 490 (Div. II, 2001) (not reported in LED)], the Court of Appeals, Division Two, agreed that the warnings did not satisfy the rule. "The revised form stated that the right to a lawyer accrues when the defendant is questioned. A defendant can be in custody, yet not be questioned. Clearly then, the revised form did not satisfy the rules."
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> Where Divisions One and Two part company on this issue is in determining whether the failure to satisfy the rule prejudiced these defendants.

[Footnotes and some citations omitted; bracketed information and underlining supplied by LED Eds].

Majority's ruling on the "harmless error" issue (which your LED Editors prefer to view, academically, not as a question of "harmless error," but of whether there was "prejudice" in the wording of the warnings)

The Templeton majority opinion explains as follows why suppression of the BAC test results was not required in any of the consolidated cases, despite the defective CrRLJ 3.1 warnings:

> Having concluded that the error in this case resulted from violation of a court rule, rather than a constitutional infirmity, the stringent " 'harmless error beyond a reasonable doubt' " standard does not apply. Instead, we apply the rule "[a]n error is prejudicial if, 'within reasonable probabilities, [if] the error [had] not occurred, the outcome of the trial would have been materially affected.' "
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> Applying that standard, under the circumstances of these consolidated cases, there was no harm to the defendants by the use of the revised form, which failed to comply with the court rule. That is because in each case, each officer advised each defendant of the right to counsel before and during any questioning. As stated by Judge Morgan [in Dunn], "[t]he combined effect was to inform each defendant that he or she had a right to counsel right now--in other words, 'as soon as feasible after [being] taken into custody[.]' " "No defendant thereafter requested counsel, so it is apparent that none would have requested counsel even if a correct form had been used." In fact, none of the defendants has alleged that but for the improper form he or she would have requested counsel before answering questions or submitting to the breath test. To insist on the form as required by the court rule would be taking advantage of a technicality to suppress the most reliable evidence of driving while intoxicated in each of these cases.
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> "Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." In ruling on suppression a court should consider: (1) the effectiveness of the less severe sanctions; (2) the impact of suppression on the evidence at trial and the outcome; (3) the extent to which the objecting party will be surprised or prejudiced by the evidence; and (4) whether the violation was willful or in bad faith. Suppression is a harsh remedy to be used sparingly only where justice so requires and not where error is harmless.

> Defendants urge that DUI prosecutions present a unique situation because of the transitory nature of the evidence of intoxication. However, this claim is not unique to DUI prosecutions. DNA evidence from perspiration, saliva, blood, and other bodily fluids is common perishable evidence in rape and murder cases just as is blood alcohol evidence. In addition, blood alcohol tests for alcohol and drug evidence may be claimed to be important elements of a diminished capacity defense in any criminal case.
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> Because the officers advised each defendant of the right to counsel before questioning and then proceeded to question each defendant, who waived the right to counsel, there was no harm. Had the officers merely administered the breath test, without going through the advisement of rights in connection with the breath test, suppression might be justified. However, under these facts, the error in the advisement of rights was harmless; therefore suppression is unwarranted.

[Footnotes and some citations omitted]

Justice Smith writes a dissent against the State's position on the harmless error/prejudice issue; he is joined by Justices Johnson, Sanders and Chambers.

Result: Reversal of Court of Appeals, Division One in several cases; affirmance of Division Two in several cases; BAC results held admissible in King County DUI prosecutions of John D. Templeton, Benjamin Marginean, James Marsh, and Richard Post; BAC results also held admissible in Pierce County DUI prosecutions of Mark D. Dunn, Sygrid D. Wright, and Michael L. Roesch.

LED EDITORIAL NOTE: To conserve space, and to focus attention on what we deem to be the more practical aspects of the Templeton decision from a law enforcement perspective, we chose not to address in this LED entry the Court's comprehensive analysis affirming its constitutional authority to adopt CrR 3.1 and CrRLJ 3.1.

(4) DESPITE PRIOR RULING IN DOL LICENSE REVOCATION HEARING THAT A VEHICLE STOP WAS NOT JUSTIFIED, STATE CAN LITIGATE THAT SAME QUESTION IN A SUBSEQUENT DUI PROSECUTION (IN OTHER WORDS, "COLLATERAL ESTOPPEL DOCTRINE" DOES NOT APPLY IN THIS CONTEXT) – In State v. Vasquez, __ Wn.2d __, 59 P.3d 648 (2002), the Washington Supreme Court addresses the "collateral estoppel doctrine" and the interplay of DUI prosecutions and implied consent proceedings arising from the same DUI incident. The Court rules unanimously that a prosecutor in a DUI case may litigate the question of lawfulness of a traffic stop despite an earlier adverse ruling on that issue in an implied consent administrative proceeding concerning the same alleged DUI incident.

Under the court-created doctrine of "collateral estoppel," if the same issue was previously litigated between the same parties in a prior case that proceeded to a final (though appealable) decision, then the litigating parties are barred from re-raising that issue in subsequent litigation. One exception to the "collateral estoppel doctrine" (also known as the rule of "issue preclusion") is that the doctrine will not be applied where it would be "unjust" to do so, because the party against whom the bar is being asserted did not have the opportunity, capability and incentive to fully litigate the issue in the prior proceeding. The Vasquez Court holds that this "injustice" exception applies where a party attempts to use an determination made on an issue in a implied consent proceeding when that same issue arises during a later DUI prosecution. After extensive discussion of the case law, the Vasquez Court concludes its analysis on this "injustice" issue as follows:

> [T]he purposes of the Department of Licensing hearing and the criminal trial are fundamentally different in this case. The purpose of the administrative hearing was to determine whether Vasquez was entitled to retain his license to drive. The purpose of the criminal prosecution was to determine whether he should be punished for committing a crime. The latter inquiry "is more appropriately addressed to the criminal justice system." Further, if an administrative hearing takes on characteristics of a completely litigated trial, it would defeat the legislative purpose of conducting swift and expeditious administrative hearings. Finally, forcing the State to fully litigate matters at the administrative level would cause delays and deplete already scarce resources within the prosecutor's office.

[Citations omitted]

The Vasquez Court distinguishes the Supreme Court's decision in Thompson v. DOL, 138 Wn.2d 783 (1999) **Nov 99 LED:05**. In Thompson, the reverse chronology of criminal and administrative proceedings was presented. There, a party to an implied consent administrative proceeding succeeded in his request to the Supreme Court to bar DOL from presenting evidence on an issue in an implied consent proceeding where the issue had previously been resolved adversely to the State in a DUI prosecution relating to the same alleged DUI incident.

Result: Affirmance of Court of Appeals decision (see **April 02 LED:19** for an entry on the Court of Appeals decision); this ruling thus affirms a Grant County Superior Court conviction of Ramiro Corona Vasquez for DUI and possession of cocaine.

LED EDITORIAL NOTE: The Supreme Court's Vasquez opinion contains some unfortunate, likely-inadvertent language suggesting that probable cause is needed to justify a stop for a traffic infraction. This is unfortunate because some administrative law judges with DOL are under that misimpression, and some criminal defense attorneys have been putting forward this argument in the courts. Because most traffic stops in fact are made on clear, on-view "probable cause," it almost never makes any difference whether the standard for justifying a civil traffic stop is "probable cause" or the less stringent standard of "reasonable suspicion." However, on rare occasions, it can make a difference. The Washington Supreme Court very recently declared in State v. Duncan, 146 Wn.2d 166, 175 (2002) June 02 LED:17 that the standard for justifying a stop for a traffic infraction is reasonable suspicion (the Duncan Court declined, however, to apply the "reasonable suspicion," Terry stop standard to non-traffic civil infractions). We do not believe anything in the Vasquez opinion was intended to change the rule that the Terry standard applies to traffic stops. No doubt, however, some members of the criminal defense bar will argue differently, so prosecutors and other government officers will need to be on their toes.

(5) "ARMED WITH A DEADLY WEAPON AT THE TIME OF COMMISSION OF THE CRIME" SENTENCING PROVISION RECEIVES CONFLICTING INTERPRETATIONS IN SPLIT DECISION FAVORING STATE -- In State v. Schelin, 147 Wn.2d 562 (2002), the Washington Supreme Court splinters into 3 parts in issuing a split 4-1-4 decision in favor of the State on the question of whether a marijuana grower was "armed with a deadly weapon at the time of commission of the crime" for purposes of the sentencing enhancement provision at RCW 9.94A.125.

Five justices vote for the State's position, but only four join in the lead opinion authored by Justice Ireland in the State's favor, with Justice Alexander writing a narrower, concurring opinion in favor of the State. In light of the split opinions, it is difficult to determine the "Schelin rule," though it appears to take a restrictive view of what constitutes "armed with a deadly weapon at the time of commission of the crime."

Some principles that can be drawn from the two Schelin opinions that favor the State are as follows: (1) one must examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found, e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer, when determining whether the defendant was armed with a deadly weapon at the time of the offense; (2) the defendant or an accomplice must have been in proximity to a deadly weapon at the time a crime was committed; (3) a deadly weapon must have been accessible and readily available, and a "nexus" (connection) must be established among three things: (a) the defendant or an accomplice, (b) the weapon, and (c) the crime.

Five justices conclude that the evidence in the Schelin case established defendant's constructive possession of an easily accessible and readily available deadly weapon, as well as a nexus among the defendant, the weapon and the crime, because: (1) during the execution of a search warrant, police discovered Schelin in the basement of his home (his marijuana grow operation was located in a basement room), and he was standing within 6 to 10 feet of a loaded revolver stored in a holster, hanging from a nail in the wall; and (2) when asked by the prosecutor at trial whether "you indeed could remove that gun quickly from the holster if you needed it," Shelin answered "yes."

Dissenting are Justices Sanders, Johnson, Chambers and Madsen, all of whom would have found that Schelin was not subject to the sentencing enhancement under these facts.

Result: Affirmance of Court of Appeals decision (see **March 01 LED:16** for entry on Court of Appeals decision); the Supreme Court ruling thus affirms a Spokane County Superior Court marijuana manufacturing conviction and "armed with a deadly weapon" sentencing enhancement against Mark Logan Schelin.

(6) LACK OF MEDICAL LICENSE IS NOT AN ELEMENT OF THE CRIME OF UNLAWFUL DELIVERY OF LEGEND-DRUGS IN VIOLATION OF RCW 69.41.030 – In State v. Clausing, ___ Wn.2d ___, 56 P.3d 550 (2002) the Washington Supreme Court rules, 6-3, that lack of a valid license to practice medicine is not an element of the crime of unlawful delivery of prescription drugs under former RCW 69.41.030.

The Clausing majority describes the facts and the trial court proceedings in part as follows:

> The Washington State Board of Osteopathic Medicine and Surgery revoked the license of Dr. Vernon Clausing in April 1995 for violating RCW 18.130.180 by over prescribing the legend drugs carisoprodol (Soma) and nalbuphine (Nubain). Undeterred, Dr. Clausing hired two licensed physicians to staff his clinic on an occasional basis. He then continued to purchase these drugs, using the prescription drug authorization numbers of the two licensed physicians. Dr. Clausing then continued to supply Soma and Nubain as refills of what he claimed were valid prescriptions issued prior to the revocation of his license to practice.
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> RCW 18.130.180 provides for withdrawal of the license to practice for unprofessional conduct including, among other things, moral turpitude, professional incompetence, and criminal conviction.
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> Sheryl Reynaga is a former patient and former volunteer employee of Dr. Clausing. In July 1995, she reported to the King County police that Dr. Clausing was still distributing legend drugs despite his license suspension. Police enlisted her support for a sting operation. She made three controlled buys from Dr. Clausing while fitted with a recording device. Dr. Clausing delivered Nubain and Soma to her.

> Based on this evidence, police executed search warrants on Dr. Clausing's clinic and home. They seized large quantities of Nubain and several bulk bottles of Soma tablets. The State charged Dr. Clausing with numerous violations of the drug act. He was tried to a jury in 1997. The jury was unable to reach a verdict on three counts of unlawful delivery of a legend drug and one count of possession with intent to deliver a legend drug, all contrary to former RCW 69.41.030. The State retried those counts before a jury in 1998. And the jury found Dr. Clausing guilty of all four counts. These guilty verdicts are the subject of this appeal.

The jury instructions allowed the jury to convict Dr. Clausing if the jury found that he had dispensed legend drugs at a time when he did not have a valid medical or osteopathic license. The jury should not have been so instructed, the majority holds, because former RCW 69.41.030 does not require a valid medical license to dispense legend drugs to a person who has a valid prescription.

Justice Owens writes a dissenting opinion in favor of the State's position; she is joined by Justices Madsen and Johnson.

Result: Reversal of Court of Appeals decision that had affirmed a King County Superior Court conviction of Vernon Clausing under former RCW 69.41.030.

LED EDITORIAL NOTE: While this case was prosecuted under the former version of RCW 69.41.030, the current statute contains the same loophole.

(7) HEARSAY FROM ASSAULT DEFENDANT'S SPOUSE HELD ADMISSIBLE BECAUSE IT MEETS ER 804(b)(3) HEARSAY EXCEPTION FOR "STATEMENT AGAINST INTEREST" AND MEETS 6TH AMENDMENT CONFRONTATION CLAUSE TEST FOR RELIABILITY – In State v. Crawford, 147 Wn.2d 424 (2002), the Washington Supreme Court rules unanimously that hearsay statements from the wife of first-degree-assault defendant, Michael Crawford, was properly admitted at this trial because his wife's out-of-court declarations to police are admissible hearsay and meet the test for admissibility of interlocking statements under the Sixth Amendment's confrontation clause.

Defendant asserted marital status privilege, so his wife, who was present at the scene of the alleged crime, could not testify against him. However, hearsay statements by a person who is unavailable to testify can be admitted in evidence so long as the statements (1) fall within a hearsay exception, and (2) meet the reliability test of the Sixth Amendment clause protecting a defendant's right to confront witnesses against him.

If hearsay falls within one of the "firmly rooted" exceptions to the hearsay inadmissibility rule, then the statement generally is per se reliable and therefore admissible under the 6th Amendment confrontation clause. Courts have held the following to be "firmly rooted" exceptions: excited utterance, state of mind, adopted admission of party business record, public record, co-conspirator statements, former testimony, and statements made for purposes of medical diagnosis or treatment (though there is some conflict in the case law on this last exception). In the Crawford case, none of these "firmly rooted" exceptions applied. Instead, the only hearsay exception applicable to the wife's statement was the exception for statements "against interest" by an unavailable witness (ER 804(b)(3)). That exception is not one deemed to be firmly rooted. Hence, reliability of the statement for "confrontation clause" purposes must be analyzed under the totality of the circumstances.

The Crawford Court lists as follows the factors for determining whether hearsay statements of an unavailable witness are reliable for purposes of the Sixth Amendment confrontation clause under the totality of the circumstances:

> The nine factors include: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

The most common way for hearsay to meet this reliability test is for the hearsay to "interlock" with admissions by the defendant. The Crawford Court ultimately concludes that the separate statements that the defendant and his wife gave to the police were virtually identical. Accordingly, because the statements "interlocked," the wife's statements against her penal interest were reliable, and the police could testify to the hearsay from Crawford's wife.

Result: Reversal of Court of Appeals decision, thus reinstating Thurston County Superior Court conviction of Michael D. Crawford for first degree assault while armed with a deadly weapon.

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WASHINGTON STATE COURT OF APPEALS

NON-COMMISSIONED CITY SECURITY GUARDS INVESTIGATING MARIJUANA SMOKERS HELD TO BE "STATE ACTORS" REQUIRED TO GIVE MIRANDA WARNINGS; ALSO, CIRCUMSTANCES OF QUESTIONING HELD TO BE "CUSTODIAL ARREST" EQUIVALENT

State v. Heritage, __ Wn. App. __, __ P.3d __ (Div. III, 2002) (2002 WL 31839334)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> On June 18, 2001, two security officers patrolling Spokane's Riverfront Park saw four people in an area known as a "hot spot" for questionable activities. The unchallenged findings of the juvenile court state:
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> "6. . . . [The security officers] observed an individual identified as Aaron Maxwell on a bench facing them. . . . The officers saw Mr. Maxwell smoking what was readily observable as a marijuana pipe. As the officers approached the group, within 20 to 30 feet, both officers testified that they detected the distinct odor of burning marijuana. . . ."
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> "7. When the Officers approached the group, Mr. Maxwell immediately put the pipe to his side and cupped his hand over it when he saw the officers. An Altoids box was also observed on the ground near Mr. Maxwell. The officers told Mr. Maxwell that they had seen what he had been doing. They also told him that they were not police officers and that no one was going to be arrested by either officer. At this time, Officer Jensen was within approximately 8 feet of the entire group of four people and Officer Conley was within arm[']s length and initially behind the group when both officers made these statements. The officers told the entire group that they were not police officers, that they needed to ask them

some questions and that they would get them on their way. Some members of the group expressed dissatisfaction with Mr. Maxwell in his failure as the lookout for the group. At no time during the contact both officers had with the four individuals was there any display of handcuffs or pepper spray nor were there any sort of forceful actions designed to detain anyone. Everyone in the group was told that they were not under arrest and were never told they were being detained, other than that they were going to be asked questions and would they please answer them. The court finds no indicia of any detention whatsoever."

"8. In the course of the contact, the officers asked Mr. Maxwell 'is that your marijuana pipe?' When Mr. Maxwell denied that it was his pipe, the officers asked the question of the entire group 'Whose marijuana pipe is it?' 'We're Park Security, let's move it along.' The officers explained that it is their experience that a pipe being used to smoke marijuana might belong to another person in the group other than the person who had the marijuana. The defendant, TIFFANY HERITAGE, said, 'It's my pipe.'"

Using a cell phone, one of the security officers then called Spokane police, who arrived within five minutes and arrested Ms. Heritage. Ms. Heritage was charged with possession of drug paraphernalia. She moved to suppress the evidence seized and her statement, arguing the security officers were state actors and their questioning and detention were unlawful.

After a hearing, the court entered findings (in addition to those quoted above) to the general effect that the Riverfront Park security officers are not police officers and had no authority to use force or to effect arrests. Based on these findings, the court concluded the security officers were not agents of the state but rather "had the status of private citizens." The court thus denied the motions to suppress. Ms. Heritage then was convicted on stipulated facts.

ISSUES AND RULINGS: 1) Are non-commissioned security guards of the Spokane City Park "state actors" required to give Miranda warnings prior to custodial questioning? (ANSWER: Yes); 2) Were the circumstances present during the park questioning the functional equivalent of arrest and hence "custodial" for purposes of Miranda analysis? (ANSWER: Yes)

Status: The State plans to file a petition for review in the Washington Supreme Court.

Result: Reversal of Spokane County Superior Court (juvenile court) conviction of Tiffany Juel Heritage for possession of drug paraphernalia.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) "State actor" for Miranda purposes

Ms. Heritage objects primarily to the juvenile court's conclusion that the park security officers were not agents or instrumentalities of the state. … If the governmental employee is acting within his or her official capacity, those actions invoke constitutional protections.

There is no question here that the park security guards, who were employees of the City of Spokane, were acting within their official capacity. … The juvenile court erred by concluding the security officers "had the status of private citizens."

On reconsideration, the State contends that Miranda warnings are required only when the interrogation is by law enforcement officers. It relies on State v. Wolfer, 39 Wn. App. 287 (1984), which also [sic] involved interrogation by a school security guard. In Wolfer, the court held Miranda warnings were not required because the security guard was not " 'employed by an agency of government, federal, state or local, whose primary mission is to enforce the law.' "

We reject Wolfer's attempt to limit the scope of Miranda. Professors LaFave, et al., explain:

> The notion that Miranda does not inevitably apply whenever questions are asked in a custodial setting by a government employee is an appealing one, for not all such interrogations would seem to have a coercive impact comparable to the police questioning which concerned the Court in Miranda. This is not to say, however, that the decisions referred to above [including Wolfer] are beyond dispute, for the Supreme Court in Mathis v. United States [391 U.S. 1 (1968)], seems to have rejected the notion that Miranda applies only to criminal law enforcers. Mathis is a case which is not clouded by uncertainties about custody, for the interrogation at issue occurred while the defendant was serving a jail sentence on an unrelated matter. The questioning was by an IRS agent and--more importantly for present purposes--one who was a "civil investigator ... required, whenever and as soon as he finds 'definite indications of fraud or criminal potential,' to refer a case to the Intelligence Division for investigation by a different agent who works regularly on criminal matters." Such a referral occurred eight days after the questioning in issue, and there was no suggestion that it was improperly delayed, but yet the Court held that Miranda applied. The Mathis majority acknowledged that "tax investigations differ from investigations of murder, robbery, and other crimes" because they "may be initiated for the purpose of a civil action rather than criminal prosecution," but then concluded this was not a controlling difference because, "as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution." Additional proof that the Court does not view Miranda as limited to interrogation by police officers is provided by Estelle v. Smith [451 U.S. 454 (1981)], holding Miranda applicable to a psychiatric examination. The Court declared: "That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney is immaterial."

2 WAYNE R. LAFAVE, Jerold H. Israel, & Nancy J. King, Criminal Procedure § 6.10(c), at 622-23 (2d ed. 1999) (footnotes omitted) The authors conclude that Mathis and Estelle "support the conclusion that questioning by any government employee comes within Miranda whenever 'prosecution of the defendant being questioned is among the purposes, definite or contingent, for which the information is elicited' … as will often be manifested by the fact the questioner's duties include the investigation or reporting of crimes."

Here, arrest and prosecution of the juveniles was at least a contingent purpose of the questioning, and one of the duties of the security guards was the investigation of criminal activities in the park. We therefore conclude the security guards' actions invoked the Miranda rule. We therefore deny the State's motion for reconsideration.

2) Custodial questioning

Miranda's custody requirement is satisfied "as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Whether a defendant was in custody for Miranda purposes depends on "whether the suspect reasonably supposed his freedom of action was curtailed." It thus is irrelevant whether the police had probable cause to arrest the defendant, whether the defendant was a "focus" of the police investigation, whether the officer subjectively believed the suspect was or was not in custody, or even whether the defendant was or was not psychologically intimidated.

Here, the juvenile court's conclusion that the officers were not state actors made it unnecessary to squarely address whether Ms. Heritage was in custody for Miranda purposes. Nevertheless, the court "found" that there were "no indicia of any detention whatsoever." We are not bound by this "finding." …

There is evidence to support a conclusion that a reasonable person -- particularly a juvenile -- in Ms. Heritage's situation would believe her freedom was significantly restrained under the circumstances. The officers were wearing bullet-proof vests under T-shirts bearing gold badges with the words "Security Officer" on them. Although they did not carry firearms, each officer also wore a duty belt containing pepper spray, a collapsible baton, handcuffs, a radio, and a flashlight holder. Although the officers said they did not "arrest" anyone, one testified:

> I don't recall saying "You're not free to leave." I recall asking them, you know, "Whose pipe is this," "Whose marijuana is this," "I need to see identification," "I'm just going to get your names and we'll get you on your way."

The four individuals clearly viewed themselves to be restrained from leaving. One said: "Come on, just let us leave, man; just let us leave, come on."

The issue is not whether Ms. Heritage was *actually* under arrest, but whether a reasonable person in her situation would have believed her freedom of action had been curtailed to a degree associated with formal arrest. A reasonable person would believe her freedom was significantly curtailed when confronted by two officers bearing most of the accoutrements of police officers and who clearly were attempting to investigate a crime committed in their presence. Although the court found the security officers did not expressly instruct the individuals to stay and none of them were touched or searched, its conclusion that the individuals were not detained during this period is not supported by the evidence. Under these coercive circumstances, a reasonable person would believe his or her freedom of action had been curtailed to a degree similar to a formal arrest. Ms. Heritage thus was in custody for Miranda purposes.

...

> The State … contends the encounter was the equivalent of a Terry stop. A routine investigative stop supported by reasonable suspicion does not require Miranda warnings. Even the fact that a suspect is not "free to leave" during the course of a Terry or investigative stop does not make the encounter comparable to a formal arrest for Miranda purposes. This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less "police dominated," and does not lend itself to deceptive interrogation tactics. To qualify as a Terry stop, the detention must be "reasonably related in scope to the justification for [its] initiation."
>
> The facts here indicate the security officers' detention of Ms. Heritage and her companions was not a limited Terry stop. The officers recognized the odor of marijuana as soon as they encountered the group and undertook immediately to determine who was responsible, deceptively assuring them that no one was going to be arrested. The security officers then decided to call in Spokane police with the obvious expectation that one or more of the individuals would be arrested. This was not a limited Terry stop.
>
> It is undisputed that Ms. Heritage was not advised of her Miranda rights before she made the incriminating statement. The statement thus was inadmissible and should have been suppressed. The conviction is reversed, and the case is remanded for retrial or dismissal.

[Citations omitted; some text omitted]

LED EDITORIAL COMMENTS:

1) Are all government personnel -- whether or not commissioned and regardless of job description -- required to give Miranda warnings in custodial questioning situations?

Washington now has a split between divisions of the Court of Appeals. Division Three's Heritage decision expressly states the Court's disagreement with Division One's ruling in State v. Wolfer, 39 Wn. App. 287 (1984), which held that non-commissioned school security personnel (and presumably other non-commissioned government personnel) are not required to give Miranda warnings in custodial-questioning situations. One would hope that the Washington Supreme Court would accept review in Heritage to address this split, as well as to address the "custody" question in the case (see next comment).

2) Was this non-custodial, Terry-stop questioning or was the situation the functional equivalent of an arrest and therefore custodial for Miranda purposes?

We think that the analysis of the Heritage Court on the "custody" question under Miranda is inconsistent with case law that limits "custody" to formal arrest situations and situations that are the functional equivalent of arrest. Though the question is a close and highly context-dependent one, the Court appears not to give full consideration to the case law excluding "Terry stop" questioning from Miranda. The questioning in Heritage appeared to be a classic "Terry stop" situation that was not the functional equivalent of arrest. But we concede that we are talking about highly fact-based inquiries here - - every would-be Terry stop has its own unique features - - with much confusion in the case law and with little hope for clarity in the near future. BOTTOM LINE: When in doubt, Mirandize.

STATE PREVAILS ON ISSUES OF: 1) NO PRIVACY IN GARBAGE CAN AT NEIGHBORING ABANDONED HOUSE; 2) VOLUNTARINESS OF CONFESSION; 3) SUFFICIENCY OF EVIDENCE REGARDING METHAMPHETAMINE MANUFACTURING; AND 4) SUFFICIENCY OF EVIDENCE REGARDING RECKLESS BURNING

State v. Hepton, 113 Wn. App. 673 (Div. III, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals decision)

> Mandi Ratliff lived with her five children, ages 3 months to 10 years, in a rental house at 912 E. Desmet in Spokane. Her friend, Carey Stuhlmiller, lived in the basement with Mr. Hepton. The house next door, at 908 E. Desmet, was abandoned and boarded up due to a previous fire.
>
> Early in the morning of October 10, 2000, Ms. Ratliff's basement caught on fire. Ms. Ratliff was not present at the time, and Ms. Stuhlmiller and Mr. Hepton helped the four older children escape. The three-month-old baby remained in the house and was later rescued by fire fighters. Although the child survived, she has continuing disabilities.
>
> After the fire was extinguished, fire investigators found a two-burner hotplate in the basement next to a glass beaker containing a red residue. They also found drug paraphernalia near the hotplate, including syringes. One investigator noticed a can of starter fluid near the outdoor basement entrance. He returned a few days later -- without a warrant -- to see if the starter fluid was evidence of methamphetamine manufacture. Because the starter fluid was no longer outside the basement, the investigator decided to check a garbage can he found next to the abandoned house at 908 E. Desmet. Plastic garbage bags were lying on the ground near the garbage can. Inside the garbage can, the investigator found a can of starter fluid with holes punched in the bottom. He found over 20 boxes of pseudoephedrine in the garbage bags. A letter in the garbage can was addressed to Ms. Ratliff.
>
> Pseudoephedrine tablets and ether drained from the bottom of starter fluid cans are components in the manufacture of methamphetamine. Based on this evidence and the additional evidence found during the initial fire investigation, the district court issued a search warrant for Ms. Ratliff's premises. Officers subsequently found additional evidence of methamphetamine manufacture in the basement, including coffee filters containing a red substance believed to be red phosphorus, lye, a turkey baster, and a syringe containing a tan substance. The tan substance tested positive for methamphetamine.
>
> Mr. Hepton was charged with one count of the manufacture of a controlled substance while minors were present (RCW 69.50.401(a); 69.50.440; former 9.94A.128 (2000)), one count of first degree reckless burning (RCW 9A.48.040), and five counts of second degree criminal mistreatment of Ms. Ratliff's children (RCW 9A.42.030). His out of court statements and the evidence discovered in the warrantless search of the garbage were admitted following CrR 3.5 (admission of a confession) and CrR 3.6 (admission of physical, oral, or identification evidence) hearings.
>
> Trial was before a jury. After the State rested its case, Mr. Hepton unsuccessfully moved to dismiss for lack of evidence. The jury found Mr. Hepton not guilty of the criminal mistreatment charges, but guilty of the manufacturing and reckless burning charges.

ISSUES AND RULINGS: 1) Did Hepton have a constitutional privacy interest in garbage that he and others placed in a garbage can and bags outside a nearby abandoned house? (ANSWER: No); 2) Is there substantial evidence to support the trial court's ruling that Hepton's confession was voluntary? (ANSWER: Yes); 3) Was sufficient evidence presented to support Hepton's conviction for methamphetamine manufacturing? (ANSWER: Yes); 4) Was sufficient evidence presented to support Hepton's conviction for reckless burning? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court convictions of Craig James Hepton for first degree reckless burning and manufacturing methamphetamine while minors were present.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) No privacy in garbage left outside at abandoned house

> In State v. Boland, 115 Wn.2d 571 (1990) **Jan 91 LED:02**, the Washington Supreme Court examined the six criteria of State v. Gunwall, 106 Wn.2d 54 (1986), and held that Washington Constitution article I, section 7 provides greater protection of a defendant's privacy interest in his or her garbage than its federal counterpart. The garbage in Boland was held in a closed garbage container that had been placed on the curb outside the defendant's curtilage for pickup. Noting that a Seattle ordinance makes it unlawful for anyone other than the owner of the garbage can to remove its contents except for collection, the court held that this preexisting ordinance governed the privacy interests of garbage placed in a location for pickup by the city collector.
>
> In contrast, the garbage here had not been placed in a receptacle owned by Mr. Hepton or by any other occupants of Ms. Ratliff's house. A Spokane Municipal Code (SMC) provision prohibits any person from placing materials in or around a garbage receptacle other than "the owner or occupant of the premises for whom the service arrangements have been made." SMC 13.02.0218. Mr. Hepton contends the occupants of Ms. Ratliff's house used the garbage can next door but paid for the service to their premises, thus creating a privacy interest in the garbage can wherever it was placed. The record shows that the house at 908 E. Desmet had not had garbage service since 1998, while Ms. Ratliff's house did have garbage service. On the other hand, none of the occupants of Ms. Ratliff's house were aware that they had garbage service and did not know who was paying for it. Ms. Ratliff rented the house from Spokane Neighborhood Action Programs (SNAP), a nonprofit organization that provides affordable rental properties to low income households. Unknown to Ms. Ratliff, SNAP was paying for her garbage service.
>
> In determining whether a privacy interest exists under article I, section 7, we must ask not only what a person's subjective expectation of privacy is, but also whether that expectation is one that a citizen of this state is entitled to hold. A private affairs interest is an object or a matter personal to an individual such that any intrusion on it would offend a reasonable person. As far as the occupants of Ms. Ratliff's house knew, they were getting free garbage service by leaving their garbage in the next door neighbor's garbage can. On both a subjective and an objective level, Mr. Hepton neither had nor could reasonably expect to have the right to use the garbage can located next door. *[COURT'S FOOTNOTE: Although not discussed at the trial level, Mr. Hepton also lacks standing to challenge a search of someone else's garbage can. See State v. Jones, 146*

Wn.2d 328, 332, 45 P.3d 1062 (2002) (a defendant has no standing to challenge a search of an item he or she does not own unless the defendant is entitled to assert automatic standing).] Consequently, he had no privacy interest in the next door neighbor's garbage can.

The second component of the inquiry into possible article I, section 7 violations is whether the State unreasonably intruded. Even if the occupants of Ms. Ratliff's house exclusively used the next door neighbor's garbage can and paid for garbage service, no investigator could be reasonably expected to know that information. Garbage discovered on unoccupied premises could have been left there by anyone. Such garbage is in effect abandoned. Consequently, a police investigation into materials apparently dumped on unoccupied property is not an unreasonable intrusion. Because the investigator here did not unreasonably intrude by examining the garbage found at the next door neighbor's house, and because Mr. Hepton had no privacy interest in the neighbor's garbage can, the investigation did not constitute a search that violated article I, section 7. The evidence discovered in the garbage was properly considered by the court as a basis for issuing the search warrant.

2) Voluntariness of confession

Pro se, Mr. Hepton first contends his statements to police should not have been admitted because they were not made voluntarily. He claims that several actions by police officers psychologically pressured him to confess: police officers (1) frightened him by playing an audio tape of Ms. Ratliff stating that he had cooked methamphetamine in the basement on a prior occasion; (2) threatened to arrest Ms. Ratliff and take away her children; and (3) promised to speak to the prosecutor on his behalf if he cooperated.

Any statement that is the product of physical or psychological coercion is involuntary and inadmissible. A statement is coerced if the court finds that the defendant's will was overborne.

Following a CrR 3.5 hearing, the trial court found that Mr. Hepton was properly advised of his constitutional rights before he spoke with police on three different occasions. Further, the court found that even if officers made comments regarding possible sentencing scenarios, such comments did not constitute promises or guaranties. The evidence supports these findings. A detective testified at the CrR 3.5 hearing that he first interviewed Mr. Hepton on October 24. On that date, Mr. Hepton agreed to talk after he was advised of his Miranda rights. Later that day, Mr. Hepton called the detective and stated that he had lied during his earlier statement. Specifically, he recanted his earlier assertion that another man had cooked methamphetamine in the basement earlier on the day of the fire. The detective again interviewed Mr. Hepton three days later. As before, Mr. Hepton was advised of his rights and he agreed to talk. During this final interview, the detective told Mr. Hepton that he faced sentencing enhancements for child endangerment and that his statements would show cooperation. Another detective testified that during the last interview Mr. Hepton said he hoped his cooperation would assist him at sentencing. The detective responded that he could make no promises regarding his sentence, but that taking responsibility for his actions was a good first step.

For his part, Mr. Hepton testified that he had been under the influence of methamphetamine during his first interview. He also told the court that officers threatened to charge his girlfriend if he did not confess. Further, he claimed that the detectives offered the DOSA [Drug Offender Sentencing Alternative] treatment option as an incentive for his confession. These assertions were disputed by the detectives, who testified that he appeared lucid during his interviews. One detective remembered Mr. Hepton asking about DOSA and remembered telling Mr. Hepton that DOSA was not usually offered to a manufacturer of methamphetamine. Accepting the trial court's determination that the detectives gave the more credible rendition of the interviews, we find substantial evidence to support the trial court's determination that Mr. Hepton's will was not overborne. Accordingly, his statements were voluntary and admissible.

3) Sufficiency of meth manufacturing evidence

Here, the evidence indicates that almost all components and equipment needed to manufacture methamphetamine by the red phosphorus method were found in the basement area or in the garbage. Mr. Hepton admitted in statements to the police that he had completed the process up to the point that he only needed to precipitate out the methamphetamine crystals. The State's expert testified that during the process of drying the final product, Epsom salts (also found in the basement) added to the ether increases its volatility. From this evidence, a reasonable juror could conclude beyond a reasonable doubt that Mr. Hepton was guilty of processing methamphetamine or its immediate precursor.

4) Sufficiency of reckless burning evidence

Relevant to the charge here, a person is guilty of first degree reckless burning if he or she recklessly damages a building by knowingly causing a fire. RCW 9A.48.040. Mr. Hepton contends there is insufficient evidence that he knowingly caused a fire. A person acts knowingly if he or she knows or reasonably should have known of facts or circumstances described by a statute defining a criminal offense. RCW 9A.08.010(1)(b). If he had known that placing a beaker of methamphetamine-laced ether on a heat source would cause a fire, Mr. Hepton argues, he would not have done it. Consequently, no reasonable juror could find that he acted knowingly.

RCW 9A.08.010 permits a jury to find that a defendant has subjective knowledge if the jury finds that an ordinary person would have had knowledge under the circumstances. State v. Shipp, 93 Wn.2d 510 (1980). In other words, if the jury found that Mr. Hepton had information that reasonably should have led him to know the fact that his actions would cause a fire, the jury was entitled to find that he knowingly caused the fire. In its ruling denying Mr. Hepton's motion to dismiss the charge of reckless burning, the trial court stated that it found the knowledge element in Mr. Hepton's knowing placement of combustible substances over heat. Although the State presented no direct evidence that Mr. Hepton knew the methamphetamine compound was combustible, the jury was permitted to infer this knowledge from evidence that he had experience with the chemicals involved. He admitted attempting to manufacture methamphetamine before. Reviewing the evidence and inferences arising from that evidence in the light most favorable to the State, we conclude that a reasonable juror could find that Mr. Hepton knowingly caused the fire.

[Some citations omitted]

STRIP SEARCH INSIDE POLICE VAN UNDER WARRANT TO SEARCH DRUG DEALER'S PERSON HELD TO HAVE BEEN: 1) SUPPORTED BY PC AND 2) REASONABLY EXECUTED

State v. Hampton, ___ Wn. App. ___, ___ P.3d ___ (Div. II, 2002) (2002 WL 31875218)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> Within 72 hours of January 28, 2000, a confidential informant (CI) reported to the police that he/she had seen Hampton dealing cocaine in Tacoma. He/she reported that Hampton had been in possession of numerous small "rocks" of crack cocaine, that Hampton had been keeping the rocks in a container on his person, and that he/she had seen Hampton in possession of cocaine on at least ten prior occasions.
>
> On January 28, Officer Hayes of the Tacoma Police Department applied for a warrant to search Hampton's person for controlled substances. In an accompanying affidavit, Hayes stated that the CI had successfully performed two controlled buys; that the CI had been involved in the local drug culture for over five years; that the CI was familiar with crack cocaine; that the CI had provided information leading to the issuance of two search warrants; and that the CI had "assisted in" obtaining charges and arrest warrants in more than 90 unlawful delivery cases. Hayes also stated that "in [my] training and experience, street level controlled substance traffickers commonly conceal drugs in their underwear and groin area."
>
> The same day, a magistrate issued the requested search warrant. It commanded Hayes "to detain and search . . . [t]he person of a black male known as Malcom [sic] Hampton," and "to seize all controlled substances there found[.]"
>
> On February 3, 2000, Hayes and Officer Krause saw Hampton at a McDonald's restaurant. They took him to an unmarked police van parked across the street. The van had tinted windows, so it was difficult for someone outside to see in. They put Hampton on the van's rear bench seat and searched his pockets and shoes. When they did not find contraband there, they searched his genital area and discovered, between his penis and scrotum, a plastic bag containing 15 rocks of crack cocaine. They also found $ 629 in his wallet.
>
> On February 4, 2000, Hampton was charged with unlawful possession of cocaine with intent to deliver. Before trial, he moved to suppress the cocaine. After a hearing, the trial court denied his motion.
>
> The jury found Hampton guilty as charged, and the trial court imposed a standard range sentence of 102 months.

ISSUES AND RULINGS: 1) Did the affidavit establish probable cause to search Hampton's person for illegal drugs; i.e., did the affidavit establish: a) the CI's credibility; b) the CI's first-hand observations; and c) the current (not stale) nature of the CI's information)? (ANSWER: Yes, PC was established); 2) Did the warrant authorizing a search of Hampton's person for drugs thereby authorize a strip search of Hampton, even though the search warrant did not mention "strip searching"? (ANSWER: Yes); 3) Was the warrant reasonably executed where the strip search was conducted by same-gender persons within the privacy of a police van that had tinted windows? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court conviction of Malcolm Hampton for possession of cocaine with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Probable cause (CI credibility, basis-of-information, non-staleness-of-information)

Hampton argues that the warrant did not reasonably authorize a search of his person for drugs. This is true, he seems to claim, because the affidavit supporting the warrant did not show probable cause to believe he had drugs on his person.

An affidavit shows probable cause if it contains facts sufficient for a reasonable person to conclude that evidence of criminal activity will be found in the place to be searched. Thus, it must show "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." When the affidavit is based on hearsay, it must show that the informant "personally has seen the facts asserted" and is probably trustworthy.

In this case, Hayes' affidavit shows that on ten prior occasions the CI had seen Hampton in possession of cocaine; that in the preceding 72 hours the CI had seen Hampton dealing cocaine "out in the open"; that on the latter occasion the CI had seen Hampton in possession of numerous small pieces of cocaine in a container that he kept on his person; and that the CI had an extensive "track record" of providing reliable information. These facts were sufficient for a reasonable person to conclude that illegal drugs would probably be found on Hampton's person, and thus they were sufficient to show probable cause. Accordingly, the warrant properly authorized a search of Hampton's person for drugs.

2) Justification in warrant for strip search

Hampton argues that even if the warrant properly authorized a search of his person for drugs, it did not properly authorize a search of his genitalia for drugs. His premise is that even if a warrant properly authorizes a search of one's person for drugs, it does not properly authorize, without more, a strip search of one's external genitalia.

This premise runs counter to State v. Colin, 61 Wn. App. 111 (1991). In that case, a confidential informant supplied probable cause to believe the defendant had drugs on his person. The police applied for a warrant to search the defendant's person, but they "did not articulate reasons why a strip search was necessary and reasonable under the circumstances." The court issued the requested warrant, which the police then executed at the defendant's residence. The police took the defendant into a bedroom, searched his person including his genital area, and seized heroin they found in his underwear. Division Three upheld the search, stating:

> Here, a search warrant had been issued which expressly authorized the search of a Hispanic male matching Mr. Colin's description.
>
> . . .

> The search warrant was executed for the express purpose of procuring controlled substances likely to be found on . . . the person described in the warrant. Such substances could be readily concealed on the person so that they would not be found without a strip search. The scope of the search, while more intrusive than a search of a person's outer garments, was justified by the State's interest in obtaining criminal evidence,

Most importantly, Hampton's premise runs counter to the reasons for which some courts have imposed special requirements for strip searches. A person is "strip searched" if he or she is made to "remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person." *[COURT'S FOOTNOTE: RCW 10.79.070(1). Although this statute technically does not apply here, we use its definition of "strip search" as a matter of common law.]* "The intrusion into one's personal dignity occasioned by such searches requires that some justifiable basis exists." Such basis is often lacking when officers search a person at the national border, incident to lawful arrest, or incident to booking, because the officers are not required to have even an articulable suspicion (much less probable cause to believe) that the person is possessing contraband or evidence of crime in or under his or her clothing. Such a basis is automatically present when officers have obtained an otherwise lawful warrant to search a defendant's person for drugs, for a neutral magistrate will already have determined that the defendant is probably possessing drugs in or under his or her clothing. Accordingly, special safeguards (i.e., safeguards beyond the usual probable cause and warrant requirements) are not needed when officers conduct a strip search pursuant to a warrant based on probable cause to search a defendant's person for drugs.

We do not overlook, though we do reject, Hampton's reliance on State v. Thein, 133 Wn.2d 133 (1999) **Aug 99 LED:15**. Thein precludes a finding of probable cause to search the house of a suspected drug dealer when the only link between his dealing and his house is an officer's generalized statement that drug dealers often keep drugs at home. Thein does not preclude such a finding when the link between his dealing and his house is provided by information from a CI that meets both prongs of Aguilar-Spinelli. Nor, analogously, does Thein preclude a finding of probable cause to search the person of a suspected drug dealer when the link between his dealing and his person is provided by information from a CI that meets both prongs of Aguilar-Spinelli. Based on the CI's information in this case, the magistrate had probable cause to command a search of Hampton's entire person, with or without Hayes' statement that drug dealers commonly conceal drugs in their underwear or groin areas. We conclude that when the warrant here was issued, it properly authorized a search of the area between Hampton's penis and scrotum.

3) Reasonableness of execution of search warrant

Having concluded that the warrant properly authorized the search, we turn to whether the warrant was properly executed. Any warrant must be executed reasonably. At a minimum, this means that a warrant-authorized strip search must be conducted in a reasonably private place, without unnecessary touching, by persons of the defendant's gender. *[COURT'S FOOTNOTE: See RCW 10.79.100(3) (strip search shall occur "at a location made private from the observation of persons not physically conducting the search[,]" and "shall be*

performed or observed only by persons of the same sex as the person being searched, except for licensed medical professionals"). Although this statute does not apply here, its provisions provide useful guidance.]

These requirements were met here. The van had tinted windows so passersby could not see in; the officers did not engage in unnecessary or abusive touching; and the officers and Hampton were all males. We hold that the warrant was properly issued and executed, and that the motion to suppress was properly denied.

[Some citations and footnotes omitted]

LED EDITORIAL COMMENTS: The strip search conducted in this case would have been held to be unlawful if it had not been conducted under a search warrant authorizing search of Hampton's person; i.e., if it had been a warrantless search conducted incident to arrest on probable cause. See, for example, State v. Rulan C., 97 Wn. App. 884 (Div. I, 1999) May 99 LED:15, where the Court of Appeals ordered suppression of evidence obtained in a drop-em-and-spread-your-cheeks search that was conducted in a residence's bathroom as a warrantless "search incident to arrest" following an arrest of a drug dealer. We were recently asked what constitutes an impermissible "strip search" in warrantless search incident to arrest situations. We can find little guidance in this jurisdiction or others beyond easy-to-decide cases such as Rulan C. That is, we don't find cases exploring whether merely requiring a person to reveal his or her underwear constitutes an impermissible strip search (under general reasonableness analysis many such minor intrusions would likely pass constitutional muster, we think). Further complicating things is that cases such as Hampton and Rulan C. appear to take definitional guidance from the jail strip search statutes in chapter 10.79; those statutes broadly define "strip search" to include "having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person." While we cannot find controlling case law on point, we are confident that not every circumstance where a warrantless search incident to arrest reveals the arrestee's "undergarments" will be deemed to be an unreasonable search. Nonetheless, officers should proceed cautiously in this sub-area of search-and-seizure law.

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NEXT MONTH

We promised in the December 2002 **LED** to provide an article in 2003 addressing the Washington case law on custodial arrest for driving while suspended. We have missed our self-imposed February 2003 deadline, but we now expect to have that article ready for the March 2003 **LED**.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at

[http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2002, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2002 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's home page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office home page is [http://www/wa/ago].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the LED should be directed to [ledemail@cjtc.state.wa.us]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LED's from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.cjtc.state.wa.us].